519.

SUPREME COURT OF THE UNITED STATES.

No. 83.

WILLIAM McELMOYLE, PLAINTIFF IN ERROR,

VERSUS

JOHN J. COHEN, ADM. OF LEVY FLORENCE.

ON A CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT U. S. FOR GEORGIA.

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520.

GEORGIA.

PETITION, &c.

To the honorable the Sixth Circuit Court of the United States, for the District of Georgia.

The petition of William McElmoyle, who is a citizen of the State of South Carolina, and who sues for the use of Isaac S. Bailey, also a citizen of that State, respectfully showeth:

That John J. Cohen, administrator of all and singular, the goods and chattels, rights and credits, which were of Levy Florence, late of the State aforesaid, who died intestate; said Cohen and said Florence, when in life, being a citizen of the county of Richmond, in the State aforesaid, owes to, and unjustly detains from, your petitioner, the sum of nine hundred and sixty-eight dollars and seven cents, besides interest; for that, whereas, your petitioner, the said William McElmoyle, heretofore, to wit, on the sixteenth day of February, in the year eighteen hundred and twenty-two, in the court of common pleas for Charleston district, in the State of South Carolina, by the consideration and judgment of the said court, recovered against the said Levy Florence, the sum of nine hundred and sixty-eight dollars and seven cents, in a suit upon a promissory note above demanded, which in and by the said court, were then and there adjudged to your petitioner for his damages, which he had sustained, as well by reason of the non-performance by the said Levy, of certain promises and undertakings then lately made by the said Levy to your petitioner, as for his costs and charges by him, about his suit, in that behalf expended, whereof the said Levy was convicted, as by the exemplification of said judgment made out and attested in proper form, and here to the court now shown, more fully appears; which said judgment still remains in full force and effect, not reversed, unsatisfied, or otherwise vacated. And your petitioner hath not obtained any execution or satisfaction of, or upon the said judgment, so recovered as aforesaid, whereby an action hath accrued to your petitioner to demand and have of, and from, the said John J. Cohen, administrator as aforesaid, the sum of nine hundred and sixty-eight dollars and seven cents, above demanded. Yet the said Levy Florence, in his lifetime, and the said John J. Cohen, administrator as aforesaid, after the death of the said Levy, have not, nor hath either of them, as yet, paid and satisfied the said judgment, although often requested so to do, but to pay the same or any part thereof to your petitioner, the said Levy in his lifetime wholly refused; and the said John J. administrator as aforesaid, hath ever since the death of the said Levy, hitherto wholly refused, and still doth refuse; to the damage of your petitioner, the said William, three thousand dollars. Wherefore, your petitioner brings his suit, and prays that process may issue, requiring the said John J. Cohen, administrator as aforesaid, to be, and appear at the next cir-

cuit court to be held in Savannah in May next, then and there to answer your petitioner, in an action of debt, &c.

AUGUSTUS B. LONGSTREET
Pltffs. Atto.

I acknowledge service of this writ, and wave a copy and process, May 3, 1834.

APPEARANCE AND PLEAS.

And now, at rules comes the defendant, by Andrew J. Miller, his attorney, and defends the wrong and injury, when, &c. and says that the plaintiff ought not to have and maintain his said suit against this defendant, because he says that the plaintiff's cause of action has not accrued within five years, next before the commencement of his said suit; and of this he puts himself upon the country, &c. And for further plea in this behalf, this defendant says that he has fully administered all and singular, the goods and chattels, rights and credits, of the said Levy Florence, that have come to his hands to be administered, and of this he puts himself upon the country, &c.

A. J. MILLER;
Defts. Atty.

And the defendant doth the like.

AUGUSTUS B. LONGSTEET,
Plffts. Atto.

CONSENT TO SUBMIT CASE TO DECISION OF CIR. COURT.

WILLIAM MCELMOYLE, for the use of Bailey
vs.
JOHN J. COHEN, adm. of Levy Florence, dec'd. } Debt on Judgment.

SIXTH CIRCUIT COURT UNITED STATES,

District of Georgia.

It is agreed between the parties, that the said cause shall be submitted to the court, upon the following statement of facts: The judgment, upon which the plaintiff sues, was obtained against Levy Florence, in South Carolina, in 1820; he then removed to the State of Georgia, where he resided for more than five years previous to his death. The defendant pleads the statute of limitations of the State of Georgia, and plene administravit prœter. The questions submitted are:

1st. Does the statute of limitations of Georgia bar the action, it being admitted that the statute of limitations of South Carolina does not bar judgments? and

2d. Does a judgment obtained in another State take precedence of a simple contract debt in the administration of an insolvent estate in Georgia? Either party at liberty to except to the decision and to carry the case to the supreme court.

A. B. LONGSTREET,
Pltffs. Atto.

A. J. MILLER,
Dfts. Atto.

Filed 7th April, 1835. GEO. GLEN, *Clerk*

JUDGE'S DECISION.

WM. MCELMOYLE,
vs.
ADM'OR FLORENCE.

This is an action of debt brought on a judgment rendered in South Carolina. The defendant pleads the statute of limitations, and fully administered. The case is submitted to the court by consent of parties, on two questions arising out of the two pleas. The first is, whether the statute of limitations of Georgia bars this action?

There can be no doubt it does, for five years had passed between the date of the judgment and the commencement of this action, and whether there be or not a statute of limitations of South Carolina, is quite immaterial in respect to this suit, and I adjudge the first plea a complete bar to this action. The above settles the case, but there is another question, and that is, whether judgments obtained in other States take precedence of simple contract debts, in the administration of an insolvent estate in Georgia. This question has been adjudged in this court already, that judgments of other States, in the administration of insolvent estates in Georgia, take no precedence of simple contract debts, and I feel no inclination to disturb that decision. Ten Eyche and Ten Eyche. Judgment for the defendant.

J. CUYLER.

7th April, 1835.

POSTEA.

Afterwards, to wit, on the sixth day of November, in the year of our Lord eighteen hundred and thirty-five, being a day of the term of the said court, held at Milledgeville, on the Thursday after the first Monday in November, in the year aforesaid, before the honorable James M. Wayne and the honorable Jeremiah Cuyler, presiding judges of the said court, came the said parties, as follows, to wit:

TRIAL.

WILLIAM McELMOYLE, for the use, &c.
vs.
JOHN J. COHEN, Adm'r. of Levy Florence. } Debt.

Jury sworn. 1, Benjamin K. Butts, foreman; 2, Levi Spikes; 3, Washington Colemen; 4, John Justice; 5, William Hand; 6, Kinchen Nusom; 7, James Brantley; 8, William Bailey; 9, Thomas Little; 10, Furney Joy; 11, Daniel Capps; 12, James Marcham.

VERDICT.

Verdict. We find for the defendant with costs of suit.

BENJ. K. BUTTS,
Foreman.

NOTICE OF MOTION FOR NEW TRIAL.

McELMOYLE, for use of J. S. Bailey,
vs.
JOHN J. COHEN, Adm'r. of Levi Florence.

Defendant, or his attorney, take notice that as soon as counsel can be heard, I shall move the court for a new trial in said case, upon the following ground, that the decision of the points submitted was contrary to law.

A. B. LONGSTREET,
Plts. Atty.

I acknowledge due and legal service of the above notice, 1st March, 1836.

A. J. MILLER & J. P. KING,
Deffts. Attys.

WILLIAM McELMOYLE, for the use, &c.
vs.
JOHN J. COHEN, Adm'r. Levi Florence. } Debt.

A motion having been made in said case, for a new trial, and counsel having been heard thereon, ordered by the court, that the verdict in said case be set aside, and that a new trial be granted, on payment of costs.

Afterwards, at a circuit court of the United States, for the district of Georgia, held at Milledgevill, on the eleventh day of November, eighteen hundred and thirty-seven, being a day of the term of the said

court, held on the Thursday after the first Monday in the month and year aforesaid, came the said parties as follows, to wit:

WILLIAM McELMOYLE, for the use, &c.
vs.
JOHN J. COHEN, Adm'r. of Levi Florence. } Debt.

ORDER TO AMEND PLEA.

By consent of parties, ordered that the defendant have leave to amend his plea in said case, so far as to incorporate in said plea, the agreed statement of facts, filed in said case. And that the plaintiff have leave to demur to said plea, and the defendant to join in demurer instanter. It is further ordered, by consent of parties, that the questions of law arising upon said plea as amended, be reserved for the consideration of the judges at Chambers, and that their judgment be entered as of this term; and if they should be opposed in opinion, that the certificate to that effect be entered as of this term.

11th Nov. 1837.

AMENDED PLEA.

WILLIAM McELMOYLE, for the use, &c.
vs.
JOHN J. COHEN, Adm'r. of Levi Florence. } Debt.

With leave of the court, and by consent of parties, the defendant in said case, for further plea and answer, saith that the judgment which is the foundation of the plaintiff's writ and declaration, and whereon he now sues, is a judgment of a court of competent jurisdiction, in the State of South Carolina, and that there is no law or statute of that State, which limits suits upon judgments therein, to any particular time, nor is there any statute of limitations in that State, which is applicaple to judgments; but this defendant saith, that an act of the legislature of the State of Georgia, passed on the seventh day of December, in the year of our Lord eighteen hundred and five, provides and declares that all actions of debt on judgment obtained in courts, other than the courts of Georgia, shall be commenced and prosecuted within five years from the rendition of such judgments, and not afterwards; which statute is now in full force and unrepealed. And this defendant saith, that for seven years after the rendition of the judgment, whereon the plaintiff now sues, Levy Florence, this defendant's intestate, was a resident and citizen of the State of Georgia; but that no suit was commenced against him by the plaintiff, upon said judgment, and further the defendant saith, that for two years immediately preceding the institution of the plaintiff's said suit, this defendant had been the duly qualified administrator of the estate of the said Levy Florence, deceased, during all which time this defendant was a resident and citizen of the State of Georgia, wherefore this defendant saith, that

the plaintiff's cause of action hath not accrued or fallen within five years immediately preceding the commencement of his said suit, and that it is barred by the statute of limitations aforesaid, of which the defendant puts himself upon the country. And for further plea, this defendant saith, that he hath in hands, assets belonging to the estate of Levy Florence, deceased, sufficient to pay off and satisfy the judgment whereon the plaintiff now sues, provided said judgment be beyond the dignity of a simple contract debt, in the administration of the assets, but this defendant saith that the said judgment is but a simple contract debt, and that he has received notice of other debts of the same dignity, which will exhaust the effects of said estate in his hands to be administered, when paid off rateably with this judgment, so far as to leave in hand one dollar to be applied to said judgment. Wherefore the defendant saith that he has fully administered the effects of Levy Florence, deceased, which came to hands to be administered, except the sum of one dollar as aforesaid. And of this the defendant puts himself upon the country.

A. J. MILLER,
Defts. Atty.

Filed 11th Nov. 1837. G. GLEN, *Clerk.*

WM. MCELMOYLE, for the use, &c.
vs.
JOHN J. COHEN, Adm'r. of Levy Florence. } Debt.

REPLICATION TO AMENDED PLEAS.

And the said William McElmoyle, as to the pleas of the said John J. Cohen, by him above pleaded, saith that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said William McElmoyle, from having or maintaining his aforesaid action thereof, against him, the said John J. Cohen, and that the said William McElmoyle, is not bound by the law of the land to answer the same; and this the said William McElmoyle is ready to verify. Wherefore, for want of a sufficient plea in this behalf, the said William McElmoyle prays judgment and his debt aforesaid, together with his damages, by him sustained, on occasion of the detention thereof, to be adjudged to him, &c.

AUGUSTUS B. LONGSTREET,
Pltffs. Atty.

Filed 11th Nov. 1837. GEO. GLEN, *Clerk.*

WM. MCELMOYLE, for the use, &c.
vs.
JOHN J. COHEN, Adm'r. Levy Florence, dec'd. } Debt.

REJOINDER &C.

And the said John J. Cohen saith, that his pleas by him above plea-

ded, and the matters contained therein, in manner and form as the same are there set forth, are sufficient to bar and preclude the said William McElmoyle from maintaining his aforesaid action, and the said John J. Cohen is ready to verify and prove the same. Wherefore, inasmuch as the said William McElmoyle hath not answered said plea, the said John J. Gohen prays judgment, that the said William McElmoyle be barred of his said action.

A. J. MILLER,
Dfts. Atty.

Filed 11th Nov. 1837. GEO. GLEN, *Clerk.*

Sixth Circuit Court of the United States for the District of Georgia. Nov. Term, 1837.

CERTIF. DIV'N IN OPINION.

WILLIAM McELMOYLE
vs.
JOHN J. COHEN, Adm'r. of Levy Florence. } Debt.

Upon the trial of the above cause the following questions occurred, upon which the opinions of the judges were opposed.

First. Whether the statute of limitations of Georgia can be pleaded to an action in that State, founded upon a judgment rendered in the State of South Carolina?

Second. Whether in the administration of assets in Georgia, a judgment rendered in South Carolina, upon a promissory note against the intestate when in life, should be paid in preference to simple contract debts?

We certify that the foregoing is a true statement of the points upon which we were divided in opinion.

JAMES M. WAYNE,
Associate Justice Sup. Co. U. States.
J. CUYLER, D. J.

UNITED STATES OF AMERICA,
District of Georgia, ss.

I, George Glen, clerk of the circuit court of the United States, for the district of Georgia, do hereby certify, that the preceding and annexed writing is a true and perfect transcript of the record and proceedings remaining in said court in the cause therein mentioned, taken from and by me, carefully compared with the originals filed and being of record in my office.

In witness whereof, I have hereto set my hand and affixed the seal of the said circuit court, this ninth day of December, in the [SEAL.] year of our Lord one thousand eight hundred and thirty-seven.

GEO. GLEN, *Clerk.*